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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OLYMPIA EQUIPMENT LEASING COMPANY, ALFCO TELECOMMUNICATIONS COMPANY and PAULA JEANNE FELDMAN, as Personal Representative of the ESTATE OF ABRAHAM FELDMAN,

Petitioners,

v.

WESTERN UNION TELEGRAPH COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY

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SUMMARY OF REPLY

The facts raised in WU's Brief in Opposition[1] are addressed in Section III of this Reply. Section I sets forth the direct conflict between *Olympia Equipment Leasing Co., et al. v. Western Union Telegraph Co.* and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S.Ct. 2847 (1985), while Section II discusses WU's attempts to distinguish *Aspen.*

I. *OLYMPIA* IS IN DIRECT CONFLICT WITH *ASPEN*

Neither the result, nor the rules of law set forth in *Olympia*, can be reconciled with *Aspen. Olympia* plainly holds that if there is no duty for a monopolist to enter into a joint marketing program in the first instance, then a monopolist cannot incur antitrust liability for terminating that program. Although WU accuses Olympia of "manufacturing a conflict" (R.Br. at 11) and "mischaracteriz[ing] the Court of Appeals' opinion" (R.Br. at 8), WU never once mentions this incorrect holding or attempts to explain how it can be reconciled with *Aspen.* Nor does WU attempt to justify the Seventh Circuit's holding that if *Aspen* has any meaning at all, it is only that a monopolist may be precluded from terminating a joint marketing program if it is "indispensable" to competition. (See C.P. 14-16).

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[1] Respondent, Western Union Telegraph Company, is referred to as "WU"; Petitioners, Olympia Equipment Leasing Co., et al., are referred to as "Olympia"; WU's Brief in Opposition is referred to as "R.Br."; Olympia's Certiorari Petition is referred to as "C.P.".

WU does acknowledge, as it must, that it "told prospective vendors of . . . [terminal] equipment that it would put them on a list which its salesmen would give new subscribers" (App. A at 3) "but that later, deciding that liquidation of its own equipment inventory was proceeding too slowly, withdrew that list". (App. B at 26) (*See* R.Br. at 2, 5, 7). What WU refuses to recognize is that the specific issue decided in *Olympia* was whether WU had an unqualified legal right to withdraw that vendor list and terminate the cooperative marketing program. *Olympia* decided that issue in favor of the defendant monopolist:

> The question therefore is not whether Western Union withdrew the vendor list in order to make money at the expense of Olympia, which of course it did, but whether such withdrawal was an objectively anticompetitive act. It was not, once the basic premise that monopolists are not required to help their competitors, but need only refrain from anticompetitive acts such as denial of access to essential facilities, is granted. (App. A at 18)

Aspen, however, holds that a monopolist's right to stop helping his competitors by engaging in a joint marketing program is not unqualified, and that when such conduct is anticompetitive or exclusionary, it is unlawful. 105 S.Ct. 2856-57.

As is apparent to the Attorneys General of 21 states and legal commentators, *Olympia* not only presents the same issue as *Aspen*, but answers it in a way that squarely conflicts with that decision.[2] For this very reason, the Seventh Circuit found it necessary to take the extraordinary step of limiting a one year old Supreme Court decision to its own "unusual facts". (App. A at 16)

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[2] See, *e.g.*, Gutman, *A Posnerian Trilogy*, Litigation, Winter 1987, at 51, 52.

The legal principles set forth in *Olympia* cannot be reconciled with *Aspen* and WU does not even attempt to do so. Rather, it criticizes *Olympia* for suggesting that a plain failure to follow a recent decision of the Court calls into question the integrity of the judicial system and puts the direction of antitrust law into doubt. But, as the amicus brief of the top law enforcement officials of 21 states demonstrates, that is precisely what is here in issue.

II. WESTERN UNION'S ATTEMPTS TO DISTINGUISH *ASPEN* ARE WITHOUT MERIT

WU, like the Court of Appeals, seizes on individual words and isolated facts from *Aspen* in an effort to distinguish that decision. If all of the Court's opinions were interpreted in this manner, none would have precedential value. Completely ignored by WU is *Aspen*'s central holding that terminating a joint marketing program violates Section 2 if the purpose and effect is to injure competitors and consumers, unless the termination can be justified on the basis of efficiency or as legitimate competition on the merits (C.P. 20-21). WU is unable to confront this holding or its rationale and instead points to imagined distinctions and irrelevancies.

For example, WU argues that in *Aspen* the termination of the joint ticket disrupted a "competitive norm". WU then attempts to distinguish this from *Olympia* on the ground that joint marketing programs like WU's are not "commonly found". First, the competitive norm, in *Aspen* and *Olympia*, was that consumers were allowed to choose between plaintiffs' and defendant's product based on quality and price. In both cases that competitive norm was intentionally disrupted so as to preclude consumer choice. Second, the frequency with which a cooperative program occurs has nothing whatsoever to do with whether its ter-

mination is intended, and has, an anticompetitive effect. Finally, the implication that the joint ticket in *Aspen* was efficient but that the cooperative program in *Olympia* was not, is made in disregard of elementary economic theory. There is nothing more crucial to economic efficiency than consumer knowledge of the availability of competitive choices. *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), *vacated and remanded on other grds.*, 437 U.S. 322 (1978); *see Aspen* at 2852.

WU also argues that unlike Ski Co., it had a "normal business purpose" because it wanted to reduce its inventory and "recycle" (i.e., lease) its used equipment (R.Br. at 10). But a desire to reduce one's inventory of used, low quality equipment is no different than a desire to increase sales for any other reason. If increased sales are pursued by legitimate competition on the merits, the conduct is lawful. But when a monopolist pursues increased sales by restricting consumer access to better quality, lower priced products, it is unlawful, as *Aspen* holds.

Furthermore, WU's contention that the defendant in *Aspen*, unlike itself, did not intend to increase sales, is plainly wrong. Ski Co. discontinued the joint ticket because it wanted to capture the revenue of Aspen Highlands. 105 S.Ct. at 2852. After the cooperative program was terminated, Ski Co.'s market share went up and its competitor's sales were cut in half. While it is true that Ski Co. forwent daily ticket sales to accomplish this objective,[3] WU ignores that this was only a minor part of the means used by the monopolist to achieve its goal of increased sales—precisely WU's goal in this case.

[3] Furthermore, the evidence showed that WU engaged in strikingly similar exclusionary conduct when it refused Olympia's offer to purchase its terminals.

Finally, WU claims that in *Aspen* the termination of the joint ticket "left Highlands unable to offer a substitute" product. Although Highland could not duplicate the cooperative program, it clearly could and did continue to offer a substitute ski ticket and in fact retained an 11% market share. 105 S.Ct. at 2853.

In short, WU's distinctions lack substance since they refuse to deal with *Aspen's* central holding that Ski Co. violated Section 2 of the Sherman Act when it terminated the joint marketing program. And, although WU claims to rely on "settled principles of antitrust law" (R.Br. at 1) it is unable to cite a single case in support of any of its distinctions. In fact, the leading authority, and the only case which could have settled these principles, is *Aspen*.

III. WESTERN UNION'S FACTUAL STATEMENT IS IMMATERIAL TO THE *ASPEN* CRITERIA AND IGNORES THAT THE JURY, BASED ON "OVERWHELMING" EVIDENCE, REJECTED THOSE FACTUAL CONTENTIONS

Aspen holds that the jury must apply three factors in determining whether a monopolist's termination of a cooperative program is exclusionary: (i) the effect of the termination on defendant's smaller rivals (here, the two largest competitors were driven from the market and the combined market share of all WU's competitors went from 78% to 18%); (ii) the effect on consumers (here, WU significantly raised its prices on inferior equipment, excluded better, lower priced equipment, and extracted monopoly profits from consumers); and (iii) whether the termination is unnecessarily restrictive of competitive conditions or can be justified on the basis of efficiency (here, WU advanced no efficiency justification and could have competed on the merits by simply lowering the price of its used equipment).

Each fact mentioned above is set forth in Olympia's statement of the case. All were before the jury and none are contested by WU. Accordingly, it is uncontested that there was sufficient evidence before the jury to support a verdict for plaintiff pursuant to the *Aspen* criteria. WU's counterversion of the facts, which it repeats throughout its brief, is thus legally irrelevant.

Moreover, the jury was more than entitled to reject WU's version of the facts—and did so. For example, WU hypothesizes that Olympia was driven from the market because it was a "tax shelter" or a weak "skeletal organization". The evidence, however, showed that Olympia was the "biggest and best vendor", and that its terminal orders went from 425 per month to 0 because, as even the Seventh Circuit acknowledges, WU "told the salesmen to stop showing the list of vendors to its subscribers". App. B at 26. The fact that Olympia, like other sophisticated businesses, was structured as a tax advantaged investment which generated investment tax credits and accelerated depreciation in no way detracts from the jury's antitrust findings.

Similarly, there is no evidence that WU's commission schedule ever caused salesmen to "push" vendors' terminals or that the termination of the joint marketing program was not responsible for Olympia's sudden lack of business. No witness testified that vendor terminals were ever "pushed". Rather, as the jury learned, WU paid salesmen almost twice as much for selling a WU terminal as for any other placement, and thus the salesmen were always "pushing" WU's terminals. Indeed, WU's salesmen admitted that the only way they ever encouraged vendor placements was by passing out the vendor list. (T3604-06). Accordingly, WU argued to the jury that the vendors' success in the summer of 1975 was due not to "pushing",

but to the fact that WU was "out of inventory". Since even WU now rejects this factual contention, it is scarcely in a position to criticize the jury for also doing so.

WU also asserts that despite termination of the joint marketing program "some" vendors were able to "hang on". WU fails, however, to identify the legal significance of this argument. Indeed, the fact that WU could suddenly force its competitors to "hang on", and that only "some" managed to do so, is persuasive evidence of WU's monopoly power. Further, there is nothing in *Aspen*, or any other case, to suggest that exclusionary use of monopoly power may be defended on the grounds that not all competitors were driven from the market.

Moreover, the fact that vendors, with better equipment and lower prices,[4] could only "hang on" and saw their market share fall from 78% to 18% is not evidence which is helpful to WU. It merely proves that WU possessed and exercised monopoly power. Nor is WU's reference to a 1978 list of 65 additional terminal companies inconsistent with the notion that WU closed the terminal market in September, 1975. Indeed, WU was unable to prove that even one of those 65 companies ever sold or leased a terminal from the time the terminal market was closed through 1978.

Similarly, WU's chart of terminals "in use" (R.Br. at 5), in no way reflects that vendors "capture[d] a larger share of the market in each year" (R.Br. at 12). To prove WU wrong, one need only compute the year end statistics for vendor placements for 1975, as well as 1976 (the year

[4] Olympia's lease price was generally 10% lower for new terminals than was WU's price for terminals that were as much as 30 years old. Other vendors also offered new equipment at lower monthly charges than WU.

following termination of the joint marketing program). These statistics are arrived at by subtracting the number of vendor terminals in use at the end of the prior year from those in use at the end of 1975 and 1976, respectively. As the jury learned, this demonstrates that vendors sold or leased thousands fewer terminals in 1976 than they did in 1975 even though the joint marketing program was terminated two-thirds of the way through 1975. Thus, as opposed to increasing, the vendors' market share actually fell precipitously.[5] Moreover, using WU's own chart it becomes apparent that by 1979, seven years after the market was opened, WU with higher priced equipment that was 20 to 30 years old, still had a monopolistic market share of 72%.

WU also argues that the existence of the Telex/TWX "directory" makes it "obvious" that existing customers were likely to switch from WU terminals to vendor terminals. There is no need, however, to speculate as to whether customers would make such a switch. The evidence showed that the new access line customers, who needed but did not have a terminal, purchased or leased approximately 19,000 terminals a year. Existing subscribers, who had already satisfied their demand for a terminal and were listed in the directory, purchased or leased virtually no terminals at all. Indeed, WU proved only one such transaction. This is not surprising. WU's own docu-

[5] The actual decrease in the vendors' annual market share is far worse than has been discussed. WU admits that it allowed the vendors only the "net growth" on the system. (R.Br. at 3). By net growth WU means new customers in excess of customer disconnects. Since approximately 16,000 customers per year cancelled the service, WU had about 16,000 disconnected terminals to recycle each year. Remarkably, WU is asserting the right to these 16,000 placements per year without competition, leaving only the "net growth" or about 3,000 to 4,000 terminal placements per year to the vendors.

ments consistently described the vendors' only realistic business opportunity as new access line customers available through the "CPT Program". Without that program, as WU's vice-president of marketing testified, vendors had "no chance".

In sum, the district court found the jury's antitrust verdict was supported by "overwhelming evidence". (App. C at 40). Thus, when the Seventh Circuit embraced each of the defendant's factual contentions discussed above,[6] it abandoned its role as a reviewing court. *United States v. Yellow Cab*, 338 U.S. 338 (1949). Moreover, in neither mentioning nor applying the three criteria by which anticompetitive behavior is to be measured, the Seventh Circuit violated the specific dictates of *Aspen*.

CONCLUSION

The reasons why certiorari is important are well stated by the 21 Attorneys General who have appeared as *amici curiae* in support of Olympia's certiorari petition. Signifi-

[6] Pursuant to Supreme Court Rule 22.5, Olympia will not reiterate facts previously set forth in its certiorari petition. Olympia would note, however, that although WU defends the appellate courts' damage ruling, it offers no record references or logical explanation for those *de novo* appellate findings, or any reason why this court should not address that ruling. In addition, Olympia would further note that its certiorari petition demonstrates that the Seventh Circuit repeatedly made other *de novo* factual findings that are without any support in the trial court record. Nevertheless, much of WU's brief is based on those unsupportable appellate findings unaccompanied by even token references to the trial court record. (R.Br. at 2-3, 4-5, 7 and 11). WU obviously cannot support its view of the facts with evidentiary references and instead tries to bootstrap its position from the improper factual findings of the Seventh Circuit.

cantly, WU does not deny that *Olympia* is a broad ranging opinion which, like its Seventh Circuit predecessors, announces new principles of antitrust law and sweeps away decades of this Court's precedent. If it is allowed to stand, *Aspen*, along with other of this Court's antitrust decisions, will be deprived of precedential value, at least in the Seventh Circuit.

Respectfully submitted,

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